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In the
Supreme Court of the United States

OCTOBER TERM, 1982

JACK W. GRIGSBY,

Petitioner

versus

DEPARTMENT OF ENERGY,
DONALD P. HODEL and
THE UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES
VOLUME I

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QUESTIONS PRESENTED[1]

1. May a Court of Appeals properly affirm a District Court's decision on review of a federal agency order which District Court decision affirmed the order of the federal agency on a basis *not* articulated by the agency order under review?

2. Is it error for a Court of Appeals to justify its decision herein on the grounds of its own clearly erroneous decision on a prior appeal which had directed the District Court to decide the matter under review on grounds not articulated by the agency's order under review?

3. Is the Court of Appeals precluded by the "law of the case" from re-examining and correcting its previous clearly erroneous decision; and, in any event, was not the agency precluded from urging such law of the case by the representations made to this Court by the Solicitor General of the United States in opposition to an application for certiorari from the first TECA decision herein, which representations were to the effect that the previous decision was "interlocutory" and would not prevent Grigsby from obtaining relief below?

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[1] The caption of the case contains the names of all parties.

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JACK W. GRIGSBY,
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DEPARTMENT OF ENERGY,
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THE UNITED STATES OF AMERICA,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Jack W. Grigsby ("Grigsby") petitions for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals of the United States ("TECA").

OPINIONS BELOW

The opinion of the Court of Appeals ("*Grigsby-II*"), not yet reported, appears in Appendix N, hereto. The order denying rehearing is also not reported and appears in Appendix L. The opinion of the District Court is not reported and appears in Appendix Q. The prior opinion of the Court of Appeals ("*Grigsby-I*"), reversing in part a summary judgment rendered by the District Court, and remanding

the case, is reported at 585 F.2d 1069, and appears in Appendix B. This Court's denial of certiorari from *Grigsby-I* is reported at 404 U.S. 908. The opinion of the District Court, found in Appendix I, on its summary judgment is not reported. Nor is there any official report of the decision of the Department of Energy ("DOE") on appeal (Appendix J), nor of the remedial order of DOE (Appendix K).

JURISDICTION

The order of the Court of Appeals denying rehearing was dated and entered February 22, 1983 (Appendix L). This resulted from a timely petition for rehearing (Appendix M), filed by Grigsby on January 28, 1983, of the decision and opinion of the Court of Appeals decided on January 18, 1983 (Appendix N), and entered the same day.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and under the Emergency Petroleum Allocation Act of 1975, 15 U.S.C. §754, incorporating Section 211(g) of the Economic Stabilization Act of 1970, as amended (12 U.S.C. §1904, note).

STATUTES AND REGULATIONS INVOLVED

Originally at issue here were the interpretation and application of the "property definition" in the Regulations, initially adopted by the Cost of Living Council, which read as follows:

> "Property is the right which arises from a lease or from a fee interest to produce domestic crude petroleum." 38 Fed. Reg. 22538 (August 22, 1973); 10 C.F.R. §212.

This was adopted pursuant to the Economic Stabilization Act of 1970, as amended, 12 U.S.C. §1904, note. The definition was re-adopted by the Federal Energy Administration ("FEA," now "DOE") pursuant to the Emergency Petroleum Allocation Act of 1975, as amended, 15 U.S.C. §751, *et seq.* (Since no question is raised as to the meaning or effect of the statutes, they are not copied here.)

The property definition in the Regulations was amended, effective September 1, 1976, to read:

> " 'Property' means the right to produce domestic crude oil, which arises from a lease or from a fee interest. A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation." 41 Fed. Reg. 36172, August 26, 1976; 10 C.F.R. §212.72.

STATEMENT OF THE CASE[2]

In 1968, Grigsby, as operator, drilled a producing

[2] This filing is divided into three parts: Volume I is this Petition; Volume II consists of Appendices A through K, pages A-1 through A-114; Volume III consists of Appendices L through R, pages A-115 through A-145. Citations to the Appendices will be made by stating, first, the letter of the alphabet assigned to the particular Appendix, followed by the page in Volumes II or III at which the particular reference is found; for example: "App. K, pp. A-92-93." References to the record will be made by first writing the letter "R," followed by the page in the record, as, for example: "R. 385."

References to "*Grigsby-I*" are to the opinion on rehearing in *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), found in App. B, p. A-3,

oil well known as the Lucky Strike Well No. 1. (Admission No. 1, R. 131.) Louisiana Department of Conservation (now Office of Conservation) Order No. 464-F-1, effective January 22, 1969, created a unit around said well for production from the Heywood Sand reservoir designated as "Heywood RA SUB," and Grigsby was named unit operator. (Exh. Chauviere-4, R. 385.) This Order, under DOE's interpretations of its own regulations, had the effect of integrating diverse leased premises within the unit as to the particular reservoir, and of segregating those portions of the leased premises within the unit from those without the unit, both horizontally and vertically. Thus, under the "property definition," the unit was the "property"; a well drilled to and producing from a reservoir other than the unitized reservoir within the surface boundaries of the unit was producing from a "property" different from the Heywood RA SUB. (*Grigsby-I*, App. B, p. A-13-14.)

After producing for some time, the Lucky Strike Well began to produce excessive quantities of salt water. It was anticipated by Grigsby that the well would shortly "water-out," but that a well drilled "up-structure" on another leased premises within the unit would be productive from the unitized reservoir. Grigsby accordingly applied for and obtained from the Department of Conservation permission to drill a substitute unit well, and Grigsby thereupon drilled the Robert Leger No. 1 Well on another leased premises within the surface periphery of the Heywood RA SUB. (R. 301-302; 312-313.) The well was tested in the Heywood Sand reservoir, but was found to be non-productive ("watered-out"). To Grigsby's surprise, a

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(Footnote 2 continued)
et seq. References to "*Grigsby-II*" are to the opinion of TECA with respect to which the writ of certiorari is herein sought, found in App. N, p. A-121, *et seq.*

reservoir (the Upper Heywood "A" Sand reservoir) above the Heywood Sand reservoir, and separated therefrom by a thin shale barrier, was found to be productive and the Robert Leger No. 1 Well was completed therein on October 24, 1974. (R. 302-305; R. 367-371.)

Grigsby determined that production from the Robert Leger Well should be treated by him as "new oil," since he was producing from a "property" different from the Heywood RA SUB. (R. 306.) Grigsby therefore certified the oil as new crude petroleum and charged the new crude petroleum price to the purchaser. (R. 306.) This constituted the "treatment" of such oil as production from a different property under DOE's regulations and rulings. (*Cf.* DOE's Admissions Nos. 5(c), 25-28, 31, R. 130, *et seq.*) "*In hindsight,* therefore, Grigsby is correct: the Robert Leger Well No. 1 production was not from the same reservoir, hence unitized premises, as the Lucky Strike Well No. 1 production." *Grigsby v. DOE,* 585 F.2d 1069, at p. 1084 (TECA 1978). (App. B, p. A-14.)

While Grigsby had determined that the Robert Leger No. 1 Well was not producing from the unitized reservoir, under Department of Conservation practice, a period of production history would be necessary before he could obtain an order prescribing a new unit for the upper reservoir. In retrospect, six months' production history would have been sufficient, but Grigsby waited for a longer period and then applied for an order. (R. 304-305, 318.) He also felt that he should continue to pay royalty to the same persons in the same proportions, since he was confident that a new unit would have the same surface periphery. For this, and other reasons, he did so pay the royalties. (R. 307-310, 319-320.)

After a public hearing, the Commissioner of Conservation issued Order No. 464-K, effective June 15, 1976. (Exh. Chauviere-7, R. 394.) At the hearing, it was established that the Upper Heywood "A" Sand (in which the Robert Leger Well was completed) was physically separate from the Heywood Sand (in which the Lucky Strike Well was completed), and a unit was created unitizing the Upper Heywood "A" Sand, with the Robert Leger Well as the unit well. This unit was designated the Upper Heywood "A" RA SUB. (R. 364-370.) The Conservation Department Order was a matter of public record, both in the Conservation Department offices in Baton Rouge and in the conveyance records of the Parish where the unitized premises were situated.

Meanwhile, DOE (at that time called "FEA") was conducting an audit of Grigsby's compliance with the oil pricing regulations. This audit resulted in a Remedial Order dated November 29, 1976, which found that Grigsby had improperly charged "new oil" prices for "old oil." (App. K, p. A-88, et seq.) The Remedial Order was based on the wholly erroneous conclusion that the Heywood RA SUB covered *both* the Heywood Sand reservoir and the Upper Heywood "A" Sand reservoir, so that the Robert Leger Well No. 1 was producing from the same "property" as that from which the Lucky Strike Well No. 1 had formerly produced. The Remedial Order ignored the existence of Order No. 464-K, issued June 26, 1976, and also ignored a then recent change in DOE's own regulations.

Grigsby filed an administrative appeal, in which Order No. 464-K was prominently mentioned, pointing out the errors of the Remedial Order. The agency persisted in its erroneous concept (that the Heywood RA SUB covered the Upper Heywood "A" Sand), and, while making some

revisions, essentially upheld the Remedial Order in its Decision on Appeal. (App. J, p. A-67, *et seq.*)

Grigsby petitioned for review to the United States District Court for the Western District of Louisiana. DOE prematurely moved for summary judgment, on the clearly erroneous ground that only one "property" was involved because (it said) the Heywood RA SUB comprised within its legal effect the Upper Heywood "A" reservoir. The District Court granted the judgment. (App. I, p. A-50.) Grigsby appealed to TECA. TECA, on original hearing, "bought" DOE's argument to the effect that the Heywood RA SUB included the reservoir from which the Robert Leger Well was producing, but expressed its holding in terms so strong as to be clearly refutable. (App. D, p. A-21, *et seq.*) On Grigsby's petition for rehearing, TECA reversed the summary judgment as premature and clearly erroneous and remanded the case. (App. B, p. A-3, *et seq.*) But TECA went further and gave stringent instructions to the District Court which required that Court to decide the case on grounds suggested by the argument of DOE's counsel on appeal which were never articulated by the agency's order under review—and this in spite of Grigsby's citation in its Reply Brief of and quotation from *Burlington Truck Lines v. United States,* 371 U.S. 156, 159 (1962).[3]

It was open knowledge that Grigsby could not comply with the instructions. If they were binding on remand, they amounted to a direction to enter judgment for DOE.

[3] The Reply Brief stated (pp. 4-5): "...it is familiar law that the agency action may not be supported by '...appellate counsel's post hoc rationalizations for agency action...' (*Burlington Truck Lines v. United States,* 371 U.S. 156, 169 (1962); *Real v. Simon,* 514 F.2d 738, 739 (C.A. 5th 1975)) and must be upheld on the basis articulated by the agency itself."

Grigsby petitioned this Court for a writ of certiorari aimed at setting aside the instructions as requiring the District Court to decide the case "...not on grounds articulated by the agency but on grounds first articulated in the *post hoc* argument of the agency's appellate counsel." Petition, p. 2, *Jack W. Grigsby v. Department of Energy, et al.*, No. 78-742, October Term, 1978. In a brief in opposition to the granting of the writ, the Solicitor General responded to Grigsby's fears as to the restrictive effect of the instructions on remand, as follows:

> "1. *The judgment below is interlocutory.* The District Court *may conclude* that, *under Louisiana law* and *FEA regulations,* the Leger Well *always* was producing from a new 'property' and thus rule in favor of petitioner, thereby obviating any occasion for this Court's review. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)." (Emphasis added.)

Certiorari was denied. *Grigsby v. Department of Energy, et al.*, 404 U.S. 908.

On remand, Grigsby's fears as to the instructions were realized. The District Judge felt himself to be bound by the instructions and rendered judgment against Grigsby. (App. R, pp. A-141-142.) Grigsby appealed to TECA. TECA affirmed the District Court on the ground that the District Court was merely following TECA's mandate, and refused to reconsider the validity of the instructions on the grounds that they were the law of the case and, in any event, were not erroneous. (App. N, pp. A-121-123.) Grigsby applied for a rehearing (App. M, p. A-116), which was denied without opinion. (App. L, p. A-115.) Hence, this petition.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF TECA IS IN CONFLICT WITH DECISIONS OF THIS COURT IN THAT IT COUNTENANCES AFFIRMANCE OF AN AGENCY ORDER ON GROUNDS NOT ARTICULATED IN THE ORDER UNDER REVIEW.

Ever since this Court's decision in *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943), it has been consistently held that if an agency's discretionary order is to be upheld, it must be upheld, if at all, on the same basis articulated in the order by the agency itself. *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-169 (1962); *FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233, 249 (1972); *FPC v. Texaco Inc.,* 417 U.S. 380, 397 (1974); *Industrial Union Department, AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 631, n. 31 (1980). Here, the agency's articulated basis for its order was that the "property" unitized in 1969 by the Louisiana Department of Conservation in the Heywood RA SUB included the reservoir from which the Robert Leger Well No. 1 produced, commencing in October, 1974. (App. J, p. A-67, *et seq.*; App. K, p. A-88, *et seq.*) This was clearly erroneous, as held by TECA in *"Grigsby-I." Grigsby v. DOE, et al.,* 585 F.2d 1069 (TECA 1978). But this agency order was affirmed by the District Court on remand, not on this or any other ground mentioned by the agency's order, but on grounds suggested by the *post hoc* argument of DOE's appellate counsel to TECA and incorporated in TECA's "instructions" in *Grigsby I.* And TECA, in *"Grigsby-II,"* affirmed the District Court on the ground that the District Court was bound to comply with TECA's mandate in *Grigsby I.* This circular rationale supplanted the rule of *Burlington Truck Lines* and the other

cases above cited.

TECA, in *Grigsby-II,* has without explanation (even though explanation was plainly invited (App. M, p. A-117)) decided the case in apparent disregard of this Court's jurisprudence. Such a decision, if permitted to stand, could erode the precedential effect of this Court's decisions on the standards of review of federal agency orders, and thereby create significant and recurring problems. Such a decision warrants the granting of the writ.

2. THE DECISION OF TECA IN *GRIGSBY II* ATTEMPTING TO JUSTIFY ITS PRIOR ERRONEOUS "INSTRUCTIONS" IN *GRIGSBY-I* IS ITSELF CLEARLY ERRONEOUS.

TECA's opinion in *Grigsby-II* states (App. N, p. A-123):

> "More importantly, we believe the holdings in *Grigsby I* were and remain correct. The prior opinion stated that the need for certainty and finality in the enforcement of price control regulations militated against retroactive application of the LOC's subsequent separate unitization and held that DOE was presumptively entitled to rely on earlier unit classifications by the regulating state, even if those classifications were erroneous in fact."

Yet at the time of the Remedial Order (November 29, 1976), DOE presumably had available the Louisiana Department of Conservation Order No. 464-K[4] (issued

[4] La. R.S. 30:11.1 requires that the Commissioner record such an order in the conveyance records of the parish in which the property is situated within 30 days after issuance.

June 24, 1976), and certainly had it available at the time of the issuance of the Decision on Appeal (issued March 8, 1977), for it is mentioned therein. (App. J, pp. A-74-75.) Thus, at the time of the agency's final order, of which review was sought, there was before the agency conclusive evidence that the Robert Leger Well No. 1 was producing from a "property" different from the prior Heywood RA SUB, and DOE was not "entitled to rely on earlier classifications by the regulatory state," because it had conclusive evidence to the contrary in its possession.[5]

Neither the Remedial Order nor the Decision on Appeal articulated as a basis for decision the grounds given by TECA in the above quotation. TECA's use of these grounds as support for its instructions in *Grigsby-I* was clear error. Further, *Grigsby-II's* reference to DOE's right to "rely on earlier classifications by the regulatory state" is a *non-sequitur:* The previous unit order establishing the Heywood RA SUB did not purport to cover the Upper Heywood "A" Sand reservoir (R. 359-361, 364-370) and could not have been "relied on" as affecting the production from the Robert Leger Well No. 1. In any event, at the time of the issuance of DOE's final order which is under review (March 8, 1977), the agency had before it documents making it legally impossible for it to rely on any "earlier classifications by the regulatory state," even if they had existed. The problem was that DOE, having all of the evidence in hand, was still bemused by the conceit that the Heywood RA SUB was a "property" which included the Upper Heywood "A" Sand reservoir, and pitched its

[5] This is the same evidence that caused TECA to hold (*Grigsby-I*, 585 F.2d 1069 at p. 1084; App. B, p. A-14): "*In hindsight*...Grigsby is correct: the Robert Leger Well No. 1 production was not from the same reservoir, hence unitized premises, as the Lucky Strike Well No. 1 production."

decision on that ground and not on any ground mentioned by TECA.

Since *Grigsby-I* was clearly erroneous in issuing instructions to the District Court to decide the case in a manner at variance with this Court's decisions. *Grigsby-II* is clearly erroneous in seeking to justify such instructions on the basis of matters equally extraneous to the articulations of the order under review. And the error is compounded by the attempt to impute reliance on the agency's part on matters that could not legally be relied upon.

3. THE COURT OF APPEALS WAS IN ERROR IN FINDING ITSELF TO BE BOUND BY ITS PRIOR ERRONEOUS RULING AS THE LAW OF THE CASE; PARTICULARLY, SINCE DOE WAS PRECLUDED FROM SO CONTENDING.

Grigsby-II states (App. N, pp. A-122-123):

> "Appellant actually seeks review of the decision by this Court in *Grigsby I*, claiming that the instructions therein to the trial court were erroneous. The prior holdings of this Court are the law of the case, and were properly followed by the district court."

As above shown, TECA's "instructions" to the District Court in *Grigsby-I* were clearly erroneous. The "law of the case" did not prevent TECA from recognizing and correcting its own error. *Cf. White v. Murtha*, 377 F.2d 428, 431-432 (CA 5 1967); *Wm. G. Roe & Company v. Armour & Company*, 414 F.2d 862, 867-868 (CA 5 1969); *United States v. Habig*, 474 F.2d 57, 60 (CA 7 1973); *Major*

v. Benton, 647 F.2d 110, 112 (CA 10 1981). Further, by making the representations to this Court in the Solicitor General's Brief in Opposition (quoted *supra*, p. 8) to Grigsby's prior petition for a writ of certiorari (No. 78-742, October Term, 1978), DOE was precluded from relying on the "instructions" as the "law of the case."

Grigsby's prior petition to this Court pointed out the nature of TECA's instructions, showed that the agency order under review had not articulated any such grounds, and that under the holding of *Burlington Truck Lines, supra*, the instructions were clearly erroneous. It was Grigsby's hope to elicit this Court's response to the restrictive instructions in the manner of *Lawlor v. National Screen Services Corp.*, 352 U.S. 992 (1957), where this Court reversed and remanded a case so as to free a District Court of restrictions on a remand imposed by a Court of Appeals.

In order to respond to Grigsby's fears as to the restrictive effect of the instructions on remand (and to avoid review), the Solicitor General assured the Court (*supra*, p. 8) that *Grigsby-I* was "interlocutory"[6] and that the District Court could "...conclude that under Louisiana law and FEA regulations the Leger Well always was producing from a new 'property' and thus rule in favor of petitioner thereby obviating any occasion for this Court's review...." This representation was successful. Certiorari was denied. 440 U.S. 908.

In the context of a response to the statements of the petition for the writ, this was a clear reassurance that the

[6] The dictionary meaning of "interlocutory" is "...not final or definitive..." Webster's Third New International Dictionary, p. 731.

instructions were neither final nor binding on the District Court. Such a result was the target of Grigsby's petition for certiorari; Grigsby's thrust was successfully parried by the Solicitor General's assurance to this Court; the representation bound DOE and precluded it from thereafter urging that the instructions were final and binding. *Cf. Texas Co. v. Gulf Refining Co.*, 26 F.2d 397 (CCA 5 1928), cert. den. 278 U.S. 625; *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 512-513 (CA 3 1953); *Jett v. Zink*, 474 F.2d 149, 155 (CA 5 1973).

4. THIS PETITION IS SUBJECT TO DISPOSITION UNDER RULE 23.1

There is no further briefing or oral argument needed to establish that the Court of Appeals affirmed a District Court judgment which affirmed a DOE order on a basis not articulated by the DOE order under review. This is shown on the face of the record. Though this circumstance was expressly called to the attention of the Court of Appeals (as well as the District Court), the Court of Appeals ignored the decisions of this Court cited to it. There is no question that, but for the erroneous instructions of *Grigsby-I*, the District Court would have been constrained to reverse the DOE order under review because it, too, was clearly erroneous. (*Grigsby-I* is, alone, sufficient authority for that statement, since the summary judgment which was reversed in *Grigsby-I* as "clearly erroneous" was based on the self-same ground as the basis for decision articulated in the agency order under review.)

Under such circumstances, it is respectfully submitted that a summary reversal of *Grigsby-II* pursuant to Rule 23.1 would be appropriate here. *Cf., e.g., Securities & Exchange Commission v. Otis & Co.*, 338 U.S. 843 (1949).

The case might then be remanded to the District Court for final disposition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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